IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, SOUTHWESTERN DIVISION

JANE DOE, et al.,	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 3:15-cv-05052**
	)	
BRANDON EGGLESTON, et al.,	)	
Defendants.	)	

DEFENDANTS' SUGGESTIONS IN OPPOSITION TO COUNSELS' FEE APPLICATION

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A. HOURLY RATE

The starting point for determining the amount of the attorneys' fee award is to multiply the number of hours reasonably spent by the market rate for those services. *Jensen v. Clarke*, 94 F.3d 1191, 1203 (8th Cir. 2002). "As a general rule, a reasonable hourly rate is the prevailing market rate, that is 'the ordinary rate for similar work in the community where the case has been litigated.'" *Moysis v. DTG Datanet*, 278 F.3d 819, 828-29 (8th Cir. 2002)(quoting *Emery v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001)). "[W]hen fixing hourly rates, courts may draw on their own experience and knowledge of prevailing market rates." *Warnock v. Archer*, 397 F.3d 1024, 1027 (8th Cir. 2005)(citation omitted). Courts are not required to "automatically accept the lawyer's rate as reasonable." *Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake, Minn.*, 771 F.2d 1153, 1160 (8th Cir. 1985)(internal quotation and citation omitted).

Plaintiff's counsel seeks fees based upon the following proposed rates:

Monica Miller: $375/hour

David Niose: $425/hour

Arthur Benson: $500/hour

Jamie Lansford: $315/hour

These rates are excessive in light of the customary charges for similar work throughout the State, let alone for civil rights litigation in southwest Missouri. Each year, Missouri Lawyers Weekly publishes a survey of the billing rates for attorneys throughout the State. *See, e.g., Van Booven v. PNK (River City), LLC*, 2015 WL 3774043, *4 (E.D.Mo. June 17, 2015)(considering this publication in determining hourly rates). The 2016 issue lists Benson's self-reported hourly rate at $500 which places him tied for fourth highest in Kansas City, behind only agribusiness, bankruptcy, business, and securities litigation practitioners. (Ex. 1, p.3)

The survey shows that the proposed rates for each of Plaintiff's attorneys are excessive in light of the rates received by other civil rights litigators. Two attorneys listed as practicing for the ACLU in St. Louis receive rates of $275 and $365.[1] (Ex. 1, p.4) Attorneys who practice civil rights litigation for private firms in St. Louis receive associate to partner rates ranging from $155 to $400.[2] (Ex. 1, p. 5-6) Civil rights litigators in Kansas City receive rates ranging from $275-$315. (Ex. 1 p. 6) Counsels' proposed rates dwarf even those received by civil rights attorneys practicing New York and Washington, D.C. ($325-$375) on behalf of Planned Parenthood. (Ex. 1 p. 7)

Further, there is no evidence Plaintiff was unable to obtain counsel in the southwestern part of Missouri where the case actually arose and was litigated. "In a case where the plaintiff does not use local counsel, the court is not limited to the local hourly rate, if the plaintiff has shown that, in spite of his diligent, good faith efforts, he was unable to find local counsel able and willing to take the case." *Emery*, 272 F.3d at 1048. Certainly, counsel from the region where Plaintiff's case was litigated would have been less expensive than counsel from the State's metropolitan areas.

Although the experience of Benson and Niose may entitle them to rates on the higher end of the spectrum, the range of that spectrum must reflect the customary rates of the local market. *Moysis*, 278 F.3d at 828-29. The hourly rates sought in Plaintiff's application far exceed those received by similar attorneys in the State's largest metropolitan markets, let alone those obtainable in southwestern Missouri. Plaintiff's attorneys should be given hourly rates that reflect reality so their legal fees do not result in a windfall. *See St. Louis Fire Fighters Ass'n v. City of St. Louis*, 96 F.3d 323, 332 n.9 (8th Cir. 1996)(internal quotation omitted).[3]

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[1] *See Kennard v. Kleindienst*, 2015 WL 4076473, *3 (W.D. Mo. June 5, 2015)(approving hourly rates for ACLU attorneys at $180, $275, and $365)

[2] As noted by the article, and as may be the Court's experience, average legal rates in St. Louis tend to be higher than those in Kansas City. (Ex. 1, p. 1-2) This discrepancy only grows when St. Louis and Kansas City rates are compared to those received by practitioners in southwest Missouri where this case was actually litigated.

More appropriate rates for Plaintiff's attorneys fall within the $250-350 range. (Ex. 9 ¶ 5-7) Miller should receive the lowest rate of $250 to reflect her short career of practicing law for less than four years at the time she performed the vast majority of the work on this case. (Doc. 64-3, p. 3)

B. REASONABLY EXPENDED HOURS

Plaintiff's counsel touts their expertise in First Amendment and civil rights cases as substantial. (Docs. 64-1, 62-2, 64-3, 64-4) Given their experience, it would be reasonable to assume they were able to litigate this case more efficiently than less experienced lawyers. *See Planned Parenthood v. Miller*, 70 F.3d 517, 519 (8th Cir. 2005). That expected efficiency, however, does not appear in their billing records given the 536 hours[4] for which they ask to be compensated.

Attorneys are not permitted to "needlessly accumulate exorbitant legal fees with the expectation that the losing party will be called upon to pick up the entire tab." *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861, 871 (8th Cir. 1977). Courts can reduce fees based on numerous reasons including redundancy, excessive hours expended, and poor record keeping. *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992).

Counsels' time records show the total number of hours ***reasonably*** expended on this case is ***far*** less than the 536 they seek. This is especially true since this case did not present any

[3] The cases cited by movants are distinguishable. *Pollard v. Remington Arms Co.*, 2017 WL 991071, *1-5, 21 (W.D. Mo. Mar. 14, 2017)(non-civil rights class action); *Channel v. Gates & Sons Barecue*, 2016 WL 7048390, *1-3 (W.D.Mo. June 2, 2016)(FLSA case where the opponent offered no evidence opposing the proposed rates); *S.M. v. Lincoln County*, 2016 WL 6441587, * 1-3, 7 (E.D. Mo. Nov. 1, 2016)(opponent did not dispute the proposed rates).
[4] Defendants' counsel had only billed a ***total*** of 345.9 hours as of March 28, 2017. (Ex. 9 ¶ 8)

uniquely complex or novel issues.[5] Indeed, Plaintiff's counsel has cited to none, relying instead on boilerplate caselaw quotations that fail to take into account the issues actually litigated in this case.

1. Emails

All of the attorneys regularly billed for email correspondence but they fail to describe the emails, their purpose, or the number that were reviewed for each entry. For example, on May 5, 2015, both Niose and Miller block billed 1.5 hours for "[c]orrespondences with client, [each other], defendants." (Doc. 64-2 p.6; Doc. 64-3 p. 8) They both also billed a total of one hour for emails with each other and the clients on May 6 and May 8. (Doc. 64-2 p.6; Doc. 64-3 p. 8) On May 11, all four attorneys billed for email exchanges with each other for a total of 3.4 hours. (Doc. 64-2 p.6; Doc. 64-3 p. 8) Although the efforts of all involved-attorneys must be considered, it is appropriate to reduce fees when inefficiency results from an overstaffed case. *See e.g., Van Booven*, 2015 WL 3774043 at *1-2(reducing fees for telephone and email consultations between the attorneys as duplicative or excessive). Counsels' application offers no reason why this case demanded the efforts of four attorneys in two offices.

The billing records are replete with references to "emails" with little additional information to support the actual amount of time spent on the emails. For example, Benson[6] billed 1.8 hours for "[e]mails re school district witnesses and with document listing trips to Victory, email to Niose and Miller re same." (Doc. 64-1 p. 6) On May 22, 2015, Niose billed 2 hours for "[e]mails (numerous) with mm, Arthur Benson,[7] and client." (Doc. 64-2 p.6) On

[5] Further, this case involved only 3 depositions (lasting less than 5 hours total) and was resolved on cross-motions for summary judgment. (Ex. 3; Ex. 4)

[6] These entries include ones for September 25, January 6, February 4, 24, 25, March 7, 8, 17, April 4, 11. (Doc. 64-1 p. 6-7)

[7] Benson billed .4 for "[e]mails with Niose re motions to proceed anon and PHV." (Doc. 64-1, p. 5)

September 15, 2015, Niose billed 1 hour for "[e]mail correspondences with all counsel re mediation issues." (Doc. 64-2 p.6)

Oftentimes, "emails" were lumped in with other tasks without providing the amount of time spent on each. Many of the billing entries submitted by Plaintiff's attorneys consist of block billing, i.e., entries that show only the daily activities but not the amount of time spent on each enumerated task. Although block billing is not per se problematic, it does make it hard to discern whether time was efficiently spent by counsel and can support a reduced fee award. Numerous entries[8] on Lansford's billing records fail to break down the actual time spent on numerous tasks. (Doc. 64-4, p. 4-12) Niose included "emails" along with other tasks such as drafting and revising the complaint, drafting the motion to proceed anonymously, drafting Rule 26 disclosures, and drafting affidavits. (Doc. 64-2 p.6)

Without more detail, these billings appear to be redundant and excessive given that they involved the quick task of email correspondence. *See e.g., Van Booven*, 2015 WL 3774043 at *3(rejecting as too vague entries such as "[r]eceipt and review of multiple pleadings.") Moreover, the majority of the correspondence is amongst the attorneys regarding some court filling rather than correspondence to the client. (*See e.g.*, Doc. 64-4, p. 4-7) As a result, counsels' proposed fees should be reduced because many of the hours result from redundancy and over staffing. *Albright v. Bi-State Dev.*, 2013 WL 4855304, *4-5 (E.D.Mo. Sept. 11, 2013)(noting numerous charges for correspondence amongst attorneys).

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[8] E.g., entries from May 19, 2015 to May 28, 2015 ; July 29, 2015 to August 5, 2015; October 27, 2015 to November 2, 2015. (Doc. 64-4, p. 4-6, 8)

2. Pleadings

Entries[9] relating to the drafting of the Complaint in this case total 8 hours for Niose, .5 for Miller, 8.3 for Lansford, and 1.2 for Benson. (Doc. 64-1, p. 5; Doc. 64-2, p. 6; Doc. 64-3, p. 8; Doc. 64-4, p. 4) Given that the Complaint contained a mere 36 allegations, 18 hours to prepare it is unreasonable. (Doc. 1)

In June 2015, all four attorneys billed for reviewing Defendants' Answer for a total of 1.6 hours. (Doc. 64-1, p. 5; Doc. 64-2, p. 6; Doc. 64-3, p. 8; Doc. 64-4, p. 5) In July 2015, Niose and Lansford billed a total of 2.1 hours to draft a simple Scheduling Order. (Doc. 64-2, p.6; Doc. 64-4, p.5-6) These entries are redundant and excessive given the simplicity of the tasks at hand.

Plaintiff filed an Amended Complaint on October 27, 2015. (Doc. 38) Niose billed 2 hours "[d]rafting, revising, editing amended complaint, related emails, research regarding school board." (Doc. 64-2 p.6) Lansford has numerous entries from September 25, 2015 to October 29, 2015 referencing work related to the amended complaint, including 2.4 hours for editing and drafting a motion for leave to amend. (Doc. 36; Doc. 64-4 p. 7-8) Benson also spent .4 hours on emails regarding the Amended Complaint and a discovery report. (Doc. 64-1 p.6) Given the minor changes that were made by the amended complaint, and the fact that Defendants' counsel did not object to it, Plaintiff's counsel clearly billed far more time than was reasonable. (Doc. 36) Their proposed fee should be appropriately reduced. (Doc. 1, 36, 38)

3. Motions for Summary Judgment

Similarly, in May-June 2016, Plaintiff's counsel spent an inordinate amount of time on their motion for summary judgment. Miller spent approximately 196 hours on that motion, and

[9] The billing record entries for many of these hours include time spent on other tasks in addition to drafting/revising the complaint but it is impossible to determine that actual amount spent on each task. (Doc. 64-1, p. 5; Doc. 64-2, p. 6; Doc. 64-3, p. 8; Doc. 64-4, p. 4) Even so, a quarter of the time related to drafting the Complaint would border on excessive as is the amount of correspondence between counsel regarding the pleadings.

Niose, Benson, and Lansford spent 7.25, 4.4, and 1.9 respectively. (Doc. 64-1, p.7; Doc. 64-2, p. 6; Doc. 64-3, p. 8; Doc. 64-4, p. 9) Plaintiff's four attorneys also spent approximately 110 hours working on the response to Defendants' motion for summary judgment and 67 hours preparing the reply in support of their motion. (Doc. 64-1, p.7; Doc. 64-2, p. 6; Doc. 64-3, p. 8-9; Doc. 64-4, p. 9-10) These entries provide little to no detail explaining the work that actually was performed during this multitude of hours to show that it was efficiently or reasonably spent.

Although the cross-motions for summary judgment understandably took a significant amount of time to prepare, 386 hours far exceeds the amount of time that reasonably should have been expended on those motions. This is more than Defendants' counsel spent on the entire case. (Ex. 9 ¶ 8) Given counsel's experience and familiarity with this area of the law, and the straightforward issues in the case, the number of hours for the motions should be drastically reduced, by at least 50%.

4. Depositions

On December 21, 2015, Benson billed 10.4 hours for travel to and from Joplin and for deposing Victory. (Doc. 64-1 p. 6) It is 155 miles from Benson's office to the site of that deposition and takes approximately 2 ½ hours to travel. (Ex. 2) The deposition of Victory only took 2 hours and 4 minutes. (Ex. 3 p. 2, 23) Generously giving Benson 6 hours of travel time in addition to the two-hour deposition shows this entry includes at least 2.4 hours of excess billing.

Similarly, Benson billed 6.2 hours on March 4, 2016 for taking the depositions of two school officials, Jason Cravens and Brandon Eggleston. (Doc. 64-1 p. 6) Those two depositions only took about 2.2 hours. (Ex. 4) Even when Benson's return travel[10] is included, 6.2 hours is an excessive amount of time to bill for the depositions and should be reduced by over an hour.

[10] Benson billed 3 hours for travel to Joplin for the depositions on March 3, 2016. (Doc. 64-1 p. 6)

5. Fee Application

Plaintiff's counsel also seeks fees for preparing their application for attorneys' fees. For this endeavor, Benson appears to have billed 4.9[11] hours, Lansford 16.1 hours, and Miller 4 hours. (Doc. 64-1, p.7; Doc. 64-2, p. 9; Doc. 64-4, p. 11-12) These hours are also made up of numerous emails amongst counsel.

Most of Lansford's time on the fee application appears to be related to drafting the motion and suggestions in support. (Doc. 64-4 p.11-12) However, the vast majority of those suggestions is simply a cut-and-paste from fee applications filed by Miller and Niose in other cases. (Ex. 5; Ex. 6; Doc. 65) As the Court can see, those prior filings are practically identical to the one filed in this case. [12] (Ex. 5; Ex. 6; Doc. 65)

Similarly, Miller billed 3 hours for preparation of declarations filed on behalf of herself and Niose in support of their fee application. (Doc. 64-3 p. 9) Again, this entry appears excessive in light of the fact that substantially similar declarations were previously prepared and filed in other cases. (Ex. 7; Ex. 8; Doc. 64-2; Doc. 64-3)

Thus, the 25 hours purportedly expended on the fee application should be drastically reduced, if not wholly excluded.

6. Pro Hac Vice

Numerous entries involve the preparation of the pro hac vice motions for Miller and Niose. Niose lumped this task in with emails and revising the complaint on May 21 for 2 hours. (Doc. 64-2, p. 6) Miller billed .5 for preparing her motion and Benson billed .4 for discussing pro hac vice and proceeding anonymously in an email with Noise. (Doc. 64-3, p. 8) Lansford

[11] Of those, 1.3 hours to edit and proofread time records is not merely excessive, but something that should be wholly excluded using billing judgment. (Doc. 64-1, p. 7)

[12] Notably, both of those 2015 fee applications also seek more reasonable hourly rates for Miller ($225/$250) and Niose ($325) than are sought in this case. (Ex. 5, p. 14; Ex. 6, p. 14)

references work on pro hac vice numerous times in entries dated May 21, 27-28. (Doc. 64-4, p. 4-5) Lansford's entries are block-billed with other tasks but total 8.2 hours. (Doc. 64-4, p. 4-5) Lansford's time includes charges for ***revising*** and ***emailing*** Miller's pro hac vice petition. (Doc. 64-4, May 28 entry) Given Miller's experience litigating in numerous different jurisdictions, there is no reason another attorney should be necessary to review and edit her pro hac vice petition. (Doc. 64-3, ¶ 3, 5, 14)

Plaintiff's imprecise billing records in this, and numerous other instances, fail to provide for meaningful review. *See H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991). What is clear, however, is that the amount of time expended on the "administrative task" of submitting two pro hac vice motions is excessive. *See e.g., Albright*, 2013 WL 4855304 at *4(reducing 7.5 hours for preparing two pro hac vice motions prepared at counsel's highest rate).

7. Billing Judgment

In seeking an award of attorneys' fees, counsel's application should reflect "billing judgment" eliminating matters that would not properly be billed to a client. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983). Neither Miller nor Niose state that billing judgment was applied to their records. Notably, their suggestions state AHA has no support staff so they are responsible for tasks which would normally be performed by secretarial or paralegal staff. (Doc. 65, p. 9) Given that these tasks (copying, mailing, filing, organizing, etc.) exist in every lawsuit, it appears that this, at least partially, explains the inflated number of hours they billed in comparison to Defendants' counsel and warrants a reduction of their proposed fee.

Lansford also billed for items that should be excluded. Although many of her entries are block-billed, she included tasks such as "[c]opy files to Public folder," downloading photographs, documents and court filings, uploading documents to Dropbox, printing documents, and electronically filing documents with the Court. (Doc. 64-4, p. 5-11) These tasks are the types of things that should be excluded under reasonable billing judgment.[13] *See Ladd v. Pickering*, 783 F.Supp.2d 1079, 194 (E.D. Mo. 2011)(noting clerical tasks such as photocopying, mailing, scanning exhibits, and calendaring dates are not compensable).

Only Benson's affidavit professed to have exercised billing judgment. However, his bill also contains questionable entries such as .4 hours on July 30, 2015 for calendaring the Court's trial orders; 1.3 on September 10, 2015 for sending and downloading emails and pictures; and .1 on December 21, 2015 for obtaining a court reporter. (Doc. 64-1, p. 5-7) Further, Benson billed 1.3 hours to "[e]dit and proofread time records" which is not only excessive, but something that could not properly be billed to a client.

8. Success

Plaintiff's success in this case also merits a reduction in counsels' claimed fees. A plaintiff's level of success "is a crucial factor" in determining the amount of an attorneys' fee award. *Hensley*, 461 U.S. at 440.

Plaintiff's Complaint and Proposed Judgment sought an injunction wholly prohibiting Defendants from attending Victory. (Doc. 38, p. 9; Doc. 59, p. 3-4) However, the relief actually awarded to Plaintiff fell far short. Instead, Defendants were enjoined from attending Victory under three enumerated conditions in the Court's Judgment. (Doc. 62) Many of those conditions are ones that were not actually at issue in this case, e.g., there was no evidence that students were subjected to sermons.

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[13] These non-billable tasks are typically block-billed alongside more appropriate charges which makes it impossible to discern the exact amount of time spent on each. (Doc. 64-4, p. 5-11) Thus, these charges should be wholly excluded or drastically reduced in Lansford's 2015 charges on May 27-28, June 23 & 28, July 21, August 4 & 11, September 10 & 28, October 26, November 2 and her 2016 charges on August 3, and March 20, 23, & 28. (Doc. 64-4, p. 6-11)

Defendants did not—and would not—dispute that it would be improper to engage in the enumerated conditions. Defendants never claimed a desire to allow students to appear in religious promotions or to send out the release with the problematic language in the future. Instead, Defendants merely argued that the facts and circumstances of the trip to Victory had not violated those conditions.

The injunctive relief actually granted Plaintiff falls far short of that sought in her Complaint and supports a reduction to the proposed fee award. *See Peter v. Jax*, 187 F.3d 829, 838 (8th Cir. 1999)(stating the rational for § 1988 attorneys' fees "is served by declining to award fees when litigation yields only relief that in all probability was attainable without the time and expense of adversarial proceedings.")

9. Undesirability

Plaintiff's attorneys cite nothing particularly undesirable about this case. They cite no facts of any intimidation stemming from the litigation to Plaintiff. "[A] fee applicant seeking an enhancement must produce specific evidence that supports the award." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553 (2010)(internal quotations omitted). There is no evidence suggesting Plaintiff's counsel have suffered any hardship or ostracism from their Washington, D.C. or Kansas City communities for representing Plaintiff. There is no evidence of extreme, local dissatisfaction with this case, let alone much publicity about it. Counsels' mere recitation of case quotations does not meet their burden of proving the alleged undesirability of ***this*** case warrants an enhancement in the fee award.

10. Novelty/Complexity/Skill Required/Other Employment

There was nothing particularly complex or novel about the issues presented in this case. The only thing counsel cites in support of this factor is that (1) there was no caselaw "directly on point" and (2) because counsel chose to obtain Rule 30(b)(6) depositions from the School and Victory. (Doc. 65, p. 10) If these two things transform a case from ordinary to "complex" or "novel," then those two words have lost all of their meaning. Engaging in discovery and making the most out of imperfect caselaw are rudimentary parts of practicing law that even lawyers in the most routine cases regularly face. These are not extraordinary obstacles in the regular course of litigation.[14]

Counsels' argument seeks to punish Defendants for opposing Plaintiff's claim rather than just admitting defeat from the outset. (Doc. 65, p. 10) At the same time, they argue the complexity of the issues in this case, and the lack of clarity from the caselaw, warrant an increased fee award. (Doc. 4-5) These arguments reflect a misunderstanding of the purpose of attorneys' fee awards. *Peter*, 187 F.3d at 838("[A]n award of attorney's fees is compensatory, not punitive, and we will not allow a threat of paying the opposing party's unreasonable legal fees to chill the assertion of a defense of a claim.")(internal quotation omitted).

Further, counsel cites nothing about this particular case that shows an extraordinary level of skill was required to litigate this matter. This is especially true when their expertise has wholly failed to provide any, even a moderate amount, of efficiency as would normally be expected of attorneys with similar experience. Lastly, they point to nothing unique about this case which precluded counsel from other employment that would warrant an increased fee award. (Doc. 65, p. 12)

C. CONCLUSION

Counsels' application fails to show this case is one of the "rare and exceptional circumstances" the Supreme Court has said may warrant an enhanced lodestar. *Perdue*, 559 U.S.

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[14] The Supreme Court has stated that novelty and complexity of a case generally do not warrant fee enhancements because those factors are reflected by the number of hours billed. *Perdue*, 559 U.S. at 552.

at 552(internal quotations omitted). To the contrary, the application shows that Plaintiff's proposed fee should be reduced.

The proposed hourly rates fail to reflect the Kansas City legal market, let alone the legal market where the case was actually litigated. Each attorney's proposed rates should be reduced to reflect the reasonable rates where the case was litigated and, in particular, Miller's fee should be reduced to reflect her limited experience.

The number of hours sought is highly excessive, dwarfing the number of hours spent by Defendants' counsel. Counsels' billing records are replete with vague and block-billed time entries which prevent meaningful review. Moreover, many of the hours billed are the result of an overstaffed case, with duplication of effort by the attorneys and the inclusion of non-compensable, clerical tasks. The amount of time billed for the cross motions for summary judgment is simply astounding.

A more appropriate fee award would reflect lower hourly rates and substantially fewer hours more in line with what it reasonably took to litigate this case. The Court need not go through each line item in counsels' bills to make appropriate reductions and instead has discretion to simply make a percentage reduction. *See e.g.*, *Hensley*, 461 U.S. at 436-37(stating the court may attempt to eliminate specific hours or "it may simply reduce the award."); *Rural Water Sys No. 1 v. City of Sioux Ctr.*, 202 F.3d 1035, 1039 (8th Cir. 2000)(affirming the district court's 45% reduction due to the plaintiff's limited success, excessive hours, and duplication).

A reduction that approximates the amount of time spent by Defendants' counsel would be appropriate and just in light of the effort that was reasonably necessary to litigate this case.

BLANCHARD, ROBERTSON, MITCHELL &
CARTER, P.C.

By /s/ *Tyler Strodtman*
Karl W. Blanchard, Jr., #23180
Tyler Strodtman, #61064
320 West 4th Street, P. O. Box 1626
Joplin, MO 64802
(417) 623-1515 FAX (417) 623-6865
ATTORNEYS FOR DEFENDANTS

Copy hereof sent to the following by filing with the Missouri courts' electronic filing system this 20th day of April, 2017, to:

David A. Niose
Monica Lynn Miller
American Humanist Association
1777 T Street NW
Washington, DC 20009

Jamie Kathryn Lansford
Arthur A. Benson
Arthur Benson & Associates
P.O. Box 119007
Kansas City, MO 64171-9007

/s/ *Tyler Strodtman*